

STATE OF MICHIGAN
COURT OF APPEALS

LEWIS LESLIE and MARY BETH LESLIE,

Plaintiffs-Appellants,

v

SAULT STE MARIE BRIDGE COMPANY,
JAMES BEAUCHAMP, and DICKINSON
COUNTY ROAD COMMISSION,

Defendants-Appellees.

UNPUBLISHED

June 1, 2001

No. 223989

Dickinson Circuit Court

LC No. 98-010346-CZ

Before: Sawyer, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

In this adverse possession and prescriptive easement action, plaintiffs Lewis and Mary Beth Leslie appeal by right, challenging the trial court's two orders granting defendants Sault Ste. Marie Bridge Company, James Beauchamp, and Dickinson County Road Commission summary disposition. We affirm.

I. Basic Facts And Procedural History

In 1970 and 1971, the Leslies purchased parcels of land on Menominee Street near a railroad in Quinnesec Township, Dickinson County, which they still own today. The Sault Ste. Marie Bridge Company owns a strip of land as a right-of-way (the right-of way) parallel to its railroad and just north of the Leslies' property. According to the Leslies, since approximately 1970, Dickinson County has maintained a gravel road running through the Bridge Company's property that was used by the public for access from Lake Street, running nearly parallel to the railroad. The Bridge Company apparently leased the right-of-way to James Beauchamp in 1998 so that he could construct a mini-storage facility. The parties refer to this road as the "alley," so we refer to it that way as well.

In June 1998, the Leslies filed a one count complaint against defendants alleging that the alley had become a "highway by user" pursuant to MCL 221.20; MSA 9.21. In October 1998, following defendants' motion for summary disposition, the trial court granted summary disposition on this complaint pursuant to MCR 2.116(C)(8), holding that the highway-by-user statute did not create a private right of action.

The trial court, however, granted the Leslie's subsequent motion to file an amended complaint in March 1999. In their amended complaint, the Leslie's contended that they had used the alley since 1970, as had their property's previous owners. They claimed a prescriptive easement over the alley to access the back of their lots. The Leslie's also claimed that they adversely possessed a section of the Bridge Company's property, which is essentially a strip of land 35 feet wide by 165 feet long located between the alley and their property, contending that they and their predecessors in title have used this area since approximately 1970. In November 1999, the trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) on the amended complaint because, it concluded from Lewis Leslie's deposition testimony, there was no question of fact regarding whether the Leslie's had claimed the disputed pieces of property as of right. On appeal, the Leslie's challenge both orders summarily disposing of this case.

II. Standard Of Review

Whether a trial court properly granted summary disposition is a question of law that we review de novo.¹

III. Original Complaint

A. MCR 2.116(C)(8) Legal Standard

A trial court must grant a motion for summary disposition pursuant to MCR 2.116(C)(8) if "[t]he opposing party has failed to state a claim on which relief can be granted."² "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint and should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery."³ In ruling on this motion, a trial court is only allowed to consider the pleadings and may not expand the record under consideration to include, affidavits, depositions, or other documentary evidence.⁴

B. Highway-By-User

The Leslie's contend that the highway-by-user statute⁵ grants them a private cause of action to declare a privately-owned road a public highway. A statute may provide a private right of action expressly, or it may be "can be inferred from the fact that the statute provides no

¹ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

² MCR 2.116(C)(8).

³ *Int'l Brotherhood of Electrical Workers, Local 58 v McNulty*, 214 Mich App 437, 443-444; 543 NW2d 25 (1995).

⁴ MCR 2.116(C)(G)(4).

⁵ MCL 221.20; MSA 9.21.

adequate means of enforcement of its provisions.”⁶ MCL 221.20; MSA 9.21 defines what constitutes a highway-by-user:

All highways regularly established in pursuance of existing laws, *all roads that shall have been used as such for 10 years or more*, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, *shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act*. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines. [Emphasis supplied].

The highway-by-user statute does not specifically indicate which individuals or entities have the authority to invoke its authority. Rather, MCL 221.20a; MSA 9.21(1), separately provides:

A *township* with the prior written consent of the board of county road commissioners and upon petition to the township board by 51% of the property owners whose frontage abuts a road *may commence an action in circuit court to have the road determined to be a public highway and to determine the length and boundaries of the road*. If the court finds that there has been public use of the road for at least 10 years and that public authorities have expended public money on the road, it shall enter an order that the road has become a public highway setting forth the length and boundaries of that public highway. If the court finds that the road has not become a public highway, *the township* may in the same action acquire by purchase or condemnation in accordance with section 20h of this chapter the property rights of those owners who in the action claim that the road is not a public highway and the court shall enter its order that the road is a public highway and set forth the length and boundaries of that public highway. [Emphasis supplied].

The plain language of this statute⁷ refers not once, but twice to a township as the entity with the authority to commence an action to declare a highway-by-user. MCL 221.20a; MSA 9.21(1) does not provide an explicit cause of action for individuals, regardless of their property ownership.⁸ Nor can a cause of action for individuals be inferred from the statute because MCL 221.20a; MSA 9.21(1) specifically authorizes a township to commence an action to declare a

⁶ *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 695-696; 588 NW2d 715 (1998).

⁷ See *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999) (“If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible.”).

⁸ *Lane*, *supra*.

road a highway-by user, allowing for effective enforcement of that statute.⁹ Because the trial court properly concluded that the Leslies, individuals, are not entitled to commence an action to declare the alley a public road by relying on the highway-by-user statute, it also properly concluded that summary disposition was proper for the original complaint because it failed to state a claim on which the trial court could grant relief.

IV. Amended Complaint

A. MCR 2.116(C)(10) Legal Standard

When a party moves for summary disposition pursuant to MCR 2.116(C)(10), the trial court must grant the motion if “there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”¹⁰ In ruling on the motion, the trial court must consider all the documentary evidence in the record, including affidavits, admissions, depositions, and pleadings.¹¹

When a motion under subrule (C)(10) is made and supported [by documentary evidence on the record] as provided in this rule [in subsection (G)(5)], an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial.^{12]}

B. Adverse Possession And Prescriptive Easement

The Leslies argue that the alley was subject to their prescriptive easement and that they had acquired the long strip of land by adverse possession. In order for the Leslies to withstand the motion for summary disposition on their adverse possession claim to the long strip of land, they had to demonstrate that there was a genuine question of material fact concerning whether their possession of the land was “actual, visible, open, notorious, exclusive, *hostile, under cover of claim or right*, and continuous and uninterrupted for the statutory period of fifteen years.”¹³

⁹ *Id.*; see also *Donaldson v Alcona Rd Comm’rs*, 219 Mich App 718, 727, n 3; 558 NW2d 232 (1996) (suggesting that a township has primary and exclusive authority to commence an action “to declare a road a public highway”).

¹⁰ MCR 2.116(C)(10).

¹¹ MCR 2.116(G)(5).

¹² MCR 2.116(G)(4).

¹³ See *West Michigan Dock & Market Corp v Lakeland Investments*, 210 Mich App 505, 511; 534 NW2d 212 (1995) (emphasis added); MCL 600.5801(4); MSA 27A.5801(4).

C. The Long Strip Of Land

The fatal flaw in the Leslies' adverse possession claim is that they did not claim the long strip of land as of right in a hostile manner.¹⁴ In *Walker v Bowen*,¹⁵ the Supreme Court defined a "claim of right" in an extensive discussion. Reduced to its essence, a person manifests a claim of right by asserting exclusive ownership of the land, even if this claim of right is expressed by action or use rather than a statement to that effect,¹⁶ when there is no actual right to the property.¹⁷ To be sure, the Leslies acted as if they had a claim of right to the long strip of land by planting trees, cutting grass, parking vehicles, and storing old equipment and plumbing there that Lewis Leslie, a plumber, intended to recycle. Lewis Leslie even put up a sign indicating that he owned the long strip of land. The Leslies knew that they did not own the property because, Lewis Leslie said, they knew exactly where their property began and ended from their deed and because of a previous property tax dispute, they did not seek or receive permission to use the long strip of land, and they used it as if they owned it. This was sufficient to create a question of fact regarding their claim of right to the long strip of land, contrary to the trial court's conclusion.

However, a claim of right is insufficient to satisfy the basic requirements for adverse possession if the claim of right is not hostile.¹⁸

The term "hostile" as employed in the law of adverse possession is a term of art and does not imply ill will. Nor is the claimant required to make express declarations of adverse intent during the prescriptive period. Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder. See *Rose v Fuller*, 21 Mich App 172; 175 NW2d 344 (1970); also, 25 Am Jur 2d, Easements and Licenses, § 51, pp 460-461.¹⁹

At first blush, Lewis Leslie's deposition indicated that he and his wife possessed the long strip of land in a hostile manner, as indicated by the sign noting that it was their property and the way

¹⁴ Only Lewis Leslie's deposition testimony appears in the trial court record. We assume that the parties did not depose Mary Beth Leslie.

¹⁵ *Walker v Bowen*, 333 Mich 13, 20-22; 52 NW2d 574 (1952).

¹⁶ *Id.* at 21, quoting *Smith v Feneley*, 240 Mich 439, 442; 215 NW 353 (1927); see also *DeGroot v Barber*, 198 Mich App 48, 53; 497 NW2d 530 (1993) (plaintiffs expressed a claim of right, though founded in a mistaken belief regarding true boundary, by using property exclusively, "posting no trespassing signs," denying permission to others who asked to use the land); *Connelly v Buckingham*, 136 Mich App 462, 470; 357 NW2d 70 (1984) ("[T]he conduct of the defendants clearly establishes their intent to claim title to all the land within the boundary of the fence.").

¹⁷ See *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 681; 619 NW2d 725 (2000).

¹⁸ *West Michigan Dock, supra* at 511.

¹⁹ *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).

they used the land. However, he also clearly indicated that he did not feel as if he and his wife could keep others from using the land. He assumed that he could use the land so long as no one complained. In fact, he agreed with defense counsel that he would have vacated the long strip of land had its owners asked him to do so. Thus, while he and his wife used the long strip of land as if they had a right to do so, the record evidence indicates that they did not use the land in a hostile manner because they recognized that their right to use the land was inferior to the true owner's rights.²⁰ Accordingly, summary disposition for their adverse possession claim was proper.

D. The Alley

In order to support their claim that they had a prescriptive easement in the alley in the face of the motion for summary disposition, the Leslies had to demonstrate that a genuine issue of material fact remained in dispute regarding each of the elements relevant to adverse possession, except that they did not need to address the exclusivity element.²¹ The evidence on the record indicates that the Leslies used the alley by driving over it an average of five to six times a week, calling Dickinson County to repair it, and by making small improvements in its surface for their own benefit. However, the little evidence in the record concerning their attitude toward this alley implies that they used the alley because they thought it was a public thoroughfare, not because they thought the alley actually belonged to them or thought they had been given a right to use it.²²

The evidence on the also record makes clear that the Leslies used the alley in a manner consistent with the way the public uses public roads, rather than the way someone with a property interest in land may care for and use the land. For instance, though Lewis Leslie expressed concern about the condition of the alley because he did not want to harm his vehicles as he drove over it, he did not assume any significant responsibility for its repair and maintenance, instead leaving that primarily to the county road commission. Nor did the Leslies erect any structure or sign that would indicate that they had taken an interest in the alley that was adverse to the true owner's interests regardless of their willingness to allow others to use the alley. Thus, there is no

²⁰ See, generally, *Smeberg v Cunningham*, 96 Mich 378, 385; 56 NW 73 (1893) ("An entry with the intent to remain in possession until the real owner claims it, or demands rent, is not hostile."); *Whitehall Leather Co v Capek*, 4 Mich App 52, 55-56; 143 NW2d 779 (1966) (negotiating with landowner to rent the property indicated that the plaintiff acknowledged that it was not the exclusive owner, possession was not "adverse or hostile").

²¹ *West Michigan Dock, supra* at 511; see also *Dyer v Thurston*, 32 Mich App 341, ; 188 NW2d 633 (1971) ("The basic elements for a prescriptive easement are: (1) Continued and uninterrupted use or enjoyment; (2) Identity of the thing enjoyed, and; (3) A claim of right adverse to the owner of the soil, known to or acquiesced in by him.").

²² See *Reed v Soltys*, 106 Mich App 341, ; 308 NW2d 201 (1981) ("A prescriptive easement is founded on the supposition of a grant.").

remaining question of fact concerning whether their use of the alley was pursuant to a claim of right or hostile, making summary disposition proper.

Affirmed.

/s/ David H. Sawyer

/s/ Michael R. Smolenski

/s/ William C. Whitbeck